

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 78-5008

William V. Nabozny

78-5008

Petitioner

RECEIVED

JUL 5 1978

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

v.

State of Ohio

Respondent

MOTION FOR LEAVE TO  
PROCEED IN FORMA PAUPERIS

Petitioner respectfully asks this Court for leave to proceed in forma pauperis in this Court. An affidavit is attached as Exhibit A showing that petitioner comes within the statutory provisions (28 USC 1915) allowing him to so proceed.

*James R. Cooper*  
James R. Cooper  
MORROW, GORDON & BYRD  
33 West Main Street  
P. O. Box 816  
Newark, Ohio 43055  
614/345-9764  
ATTORNEY FOR PETITIONER

PROOF OF SERVICE

A copy of the foregoing motion was served on David E. Lighttiser, Prosecuting Attorney for Licking County, Ohio, Attorney for Respondent, this 5th day of July, 1978.

*James R. Cooper*  
James R. Cooper  
ATTORNEY FOR PETITIONER

OCTOBER TERM 1977

NO. \_\_\_\_\_

AFFIDAVIT

STATE OF OHIO  
COUNTY OF SCIOTO, SS:

I, William V. Nabozny, being first duly sworn, depose and say that I am the defendant-appellant in this case and in support of my motion to proceed in this Court in forma pauperis say that I am unable to pay the fees and costs to proceed in this matter or give security therefor.

I further depose and say that I am appealing my case, State of Ohio vs. William V. Nabozny, from the Supreme Court of Ohio, that I have issues to raise before the United States Supreme Court and that I believe that I am entitled to redress.

I further depose and say that I am incarcerated in the State of Ohio penal institution at Lucasville, Ohio, and have no wages or property to pay costs or give security therefor.

I further state that this Affidavit is submitted in good faith and that the contents are true.

William V. Nabozny  
William V. Nabozny

Subscribed and sworn to before me this 22 day of May, 1978.

Terry L. McGrath  
Notary Public

TERRY L. MCGRATH  
NOTARY PUBLIC, STATE OF OHIO  
MY COMMISSION EXPIRES NOV. 2, 1978

William V. Nabozny

Petitioner

v.

State of Ohio

RespondentAPPEARANCE OF COUNSEL

The undersigned hereby enters his appearance as counsel for the Petitioner in this matter. The undersigned is admitted to practice before this Court.

James R. Cooper  
James R. Cooper  
MORROW, GORDON & BYRD  
33 West Main Street  
P. O. Box 816  
Newark, Ohio 43055  
614-345-9764  
ATTORNEY FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. \_\_\_\_\_

William V. Nabozny

Petitioner

v.

State of Ohio

Respondent

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT	1
OPINION BELOW	1
STATEMENT OF THE CASE	2
ARGUMENT	3
CONCLUSION	11
PROOF OF SERVICE	12

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PETITION FOR WRIT OF  
CERTIORARI  
(ON WRIT OF CERTIORARI FROM  
THE SUPREME COURT OF OHIO)

---

James R. Cooper  
MORROW, GORDON & BYRD  
33 West Main Street  
P. O. Box 816  
Newark, Ohio 43055  
614/345-9764  
ATTORNEY FOR PETITIONER

STATEMENT OF THE CASE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. \_\_\_\_\_

WILLIAM V. NABOZNY, Petitioner

v.

STATE OF OHIO, Respondent

---

PETITION FOR WRIT OF CERTIORARI  
(ON WRIT OF CERTIORARI FROM  
THE SUPREME COURT OF OHIO)

JURISDICTIONAL STATEMENT

William V. Nabozny is before this Court on his petition for certiorari from the judgment of the Supreme Court of the State of Ohio which affirmed his conviction for aggravated murder and sentence of death on May 10, 1978. He submits this jurisdictional statement to demonstrate this Court's jurisdiction for review by writ of certiorari pursuant to 28 U.S.C. sec 1257 (3).

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at 54 Ohio St. 2d 195 (1978). It is attached as Appendix A.

-1-

This is a criminal case.

It arises from the kidnap and subsequent murder of James Crawford, an assistant branch manager for the National Bank of Detroit. Mr. Crawford was abducted from the parking lot of a branch bank office in Detroit, Michigan; and his body was subsequently found in a rural area of Licking County, Ohio.

Petitioner, William V. "Skip" Nabozny was arrested by the Federal Bureau of Investigation and later indicted and charged with aggravated murder with death penalty specifications. The indictment charged him with aggravated murder in violation of Section 2903.01 of the Ohio Revised Code; and the specification stated that this crime was committed while petitioner was committing, attempting to commit, or in fleeing immediately after committing or attempting to commit kidnapping in violation of Section 2929.04 (A)(7) of the Ohio Revised Code.

At trial the State of Ohio contended that petitioner, along with three other individuals, planned the kidnap of Mr. Crawford and that Crawford was kidnapped and then held for a ransom of \$250,000.00. After efforts to collect the money failed, contended the State, Mr. Crawford was killed. It was also contended that, prior to his death, Mr. Crawford was being held in a house on the outskirts of Newark, Ohio. This house is referred in this case as the "Maddox residence."

The case was tried by a jury in the Court of Common Pleas for Licking County, Ohio. Appellant was convicted and, after a mitigation hearing conducted by the trial judge pursuant to Ohio statutory procedure, sentenced to be executed. The Licking County Court of Appeals affirmed the finding of guilty and the sentence of death. The Supreme Court of the State of Ohio also affirmed the finding of guilty and the sentence of death.

QUESTIONS PRESENTED

1. Whether Ohio's statutory framework for the imposition of capital punishment is unconstitutional in that it violates the

- 2 -

ARGUMENT

due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and the right to trial under the Sixth Amendment of the United States Constitution and evidences discriminatory treatment between those defendants who plead guilty or no contest to aggravated murder and those defendants who exercise their constitutional right to plead not guilty and proceed to trial contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution.

2. Whether Ohio's death penalty statutes impose cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and violate the due process requirement of the Fourteenth Amendment of the United States Constitution in that they place unlawful limitations upon the consideration of mitigating circumstances in the absence of which the death penalty must be imposed.

3. Whether Section 2929.04 (B) of the Ohio Revised Code, which requires a defendant convicted of aggravated murder to bear the risk of nonpersuasion concerning certain mitigating circumstances needed to be sentenced to life imprisonment rather than death, violates the due process requirement of the Fourteenth Amendment of the United States Constitution.

1. OHIO'S STATUTORY FRAMEWORK FOR THE IMPOSITION OF CAPITAL PUNISHMENT IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION AND EVIDENCES DISCRIMINATORY TREATMENT BETWEEN THOSE DEFENDANTS WHO PLEAD GUILTY OR NO CONTEST TO AGGRAVATED MURDER AND THOSE DEFENDANTS WHO EXERCISE THEIR CONSTITUTIONAL RIGHT TO PLEAD NOT GUILTY AND PROCEED TO TRIAL. SEPCIFICALLY, PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION HAVE BEEN VIOLATED.

Copies of the pertinent statutes of the Ohio Revised Code are included in Appendix B.

Petitioner was indicted and charged with aggravated murder in violation of Section 2903.01 of the Ohio Revised Code. Contained within the indictment was the following language:



committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, in violation of Ohio Revised Code Section 2929.04

(A) (7).

Petitioner was found guilty of both the charge and the specification and, in accordance with Sections 2929.02, 2929.03, and 2929.04 of the Ohio Revised Code, was sentenced to be executed.

Sections 2929.03 and 2929.04 of the Ohio Revised Code provide that an indictment for aggravated murder may specify certain aggravating circumstances which are enumerated in Section 2929.04. If a guilty finding is returned as to the specification (or specifications), then, pursuant to 2929.03 (D), the defendant is required to undergo a presentence investigation and psychiatric examination. Then, presumably at a "mitigation hearing," the trial judge (in the case of a jury trial) is required to consider the reports noted above and any statement of counsel or defendant and to determine whether or not, pursuant to 2929.04 (B), it is established by a preponderance of the evidence, the existence of at least one of three mitigating circumstances set out in 2929.04 (B). If the court finds that none of the mitigating circumstances is established by a preponderance of the evidence, then, pursuant to 2929.03 (E), the offender shall be sentenced to death. The clear meaning of 2929.03 (E) is that the death penalty is mandatory unless the mitigating circumstances are established.

Clearly, Sections 2929.02, 2929.03, and 2929.04 represent a radical departure from the procedure existing in Ohio prior to January 1, 1974, the date of Ohio's new criminal code. Before that date, the death penalty was mandatory for first degree murder unless the jury recommended mercy. It is common knowledge that Ohio's new criminal code with respect to aggravated murder and the death penalty represented a legislative response to the decision of this Court in Furman vs. Georgia, 408 U.S. 336 (1972).

The Fifth Amendment to the United States Constitution dictates that no person shall be deprived of life or liberty without due process of law. The Fourteenth Amendment to the United States Constitution dictates that no state shall deprive a person of life or liberty without due process of law, nor deny to any person within its jurisdiction equal protection of the law. The Sixth Amendment secures the right to be tried by a jury.

That the Fifth and Fourteenth Amendments are closely aligned with the Eighth Amendment of the United States Constitution can be illustrated by the following quote from Justice Douglas of the United States Supreme Court in Furman vs. Georgia, supra at 255-256:

In a nation committed to equal protection of the laws, there is no permissible "caste" aspect of law enforcement. Yet, we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protective position.

The legislative history of Sections 2929.02, 2929.03, and 2929.04 of the Ohio Revised Code clearly indicates that the statutes were carefully drawn to circumvent the situation found to be intolerable by the United States Supreme Court. The statutes were drawn so as to remove from the discretion of judges and juries the decision of whether or not to impose the death penalty. The statutes attempted to provide strict and narrow guidelines so that the decision of life or death will be made without the passions and prejudices of judge or jury.

Petitioner contends, however, that Ohio's capital punishment laws do not meet the equal protection requirements of the United States Constitution and further, that Ohio law has an impermissible "chilling effect" on a defendant's right to plead not guilty and to demand his right to be tried by judge or jury.

On July 1, 1973, the Ohio Rules of Criminal Procedure became

effective. At the time these rules were promulgated, Sections 2929.02, 2929.03, and 2929.04 of the Ohio Revised Code had already been enacted by the legislature, but were, by the terms of the legislation, not to be effective until January 1, 1974. The repeated reference to the date January 1, 1974, in the rules clearly indicates that the Supreme Court of Ohio (the originator of the rules) was well aware of the new criminal code.

Rule 11 (C)(4) of the Ohio Rules of Criminal Procedure provides as follows:

With respect to aggravated murder committed on or after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives defendant's right to a jury trial...

If the indictment contains no specification and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice. (Emphasis added.)

Thus, in Ohio there are two different standards for imposing the death penalty for aggravated murder. The first standard is that imposed by Sections 2929.02, 2929.03, and 2929.04 of the Ohio Revised Code. When a defendant pleads not guilty and demands his right to trial, then the standards and procedures of those three statutes govern. The death penalty is mandatory unless defendant proves mitigating circumstances.

However, if the defendant foregoes his constitutional right to trial and prevails upon the court to accept his plea of guilty or no contest, then the court "... may dismiss the specifications and impose sentence accordingly, in the interests of justice."

Rule 11 (C)(4) Ohio Rules of Criminal Procedure. (Emphasis added.)

Petitioner contends that this distinction violates not only the equal protection and due process clauses of the United States Constitution, but also violates his constitutional right to trial by jury. If a defendant decides to plead not guilty

and go to trial, then, if found guilty, he must bear the risk of nonpersuasion of mitigating circumstances. However, if he pleads guilty or no contest, then the court, apparently on its own initiative, may dismiss the specifications.

The Criminal Rules in Ohio contain absolutely no guidelines for the court to follow other than the nebulous, catch-all phrase "... in the interests of justice."

The Ohio law contains another defect of even greater significance. The "in the interests of justice" standard can aid only those defendants who plead guilty or no contest. It has no application to those defendants who plead not guilty and go to trial. This defect in the Ohio law falls directly within the prohibition against discriminating against those who exercise their rights under the Fifth and Sixth Amendments to the United States Constitution. In United States vs. Jackson, 390 U.S. 570 (1968), this Court struck down the death penalty provisions of the federal kidnapping statute. Under that statute it was possible to impose a death penalty for a person who proceeded to trial provided that there was a recommendation from the jury for the death penalty. However, it was not possible to impose the death penalty against one who entered a plea of guilty or no contest. This Court said at page 581 of that decision:

The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter the exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.

The discriminatory treatment under Ohio law between those who plead guilty or no contest to aggravated murder and those who exercise their constitutional rights to plead not guilty and proceed to trial is such that the death penalty cannot be applied to this petitioner or any other defendant in this state who has been convicted of aggravated murder with death penalty specifications.

As it now stands, a defendant charged with aggravated murder with specifications must take an election. He either pleads guilty or no contest and, therefore, has available to him the opportunity to have the specifications dismissed "in the interests of justice"; or he exercises his constitutional right to proceed to trial and thereby foregoes the opportunity to have the specifications dismissed, unless it is established by a preponderance of the evidence one of the statutorily defined mitigating circumstances.

Thus, the Ohio scheme for capital punishment violates a defendant's rights to have equal protection of the law. It is unreasonable to classify defendants according to the pleas they enter and to give favorable treatment only to those who plead guilty or no contest.

Further, the Ohio laws deprive defendants of their due process rights under the Fifth Amendment as well as their right to trial under the Sixth Amendment to the Constitution of the United States.

2. OHIO'S DEATH PENALTY STATUTES IMPOSE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND VIOLATE THE DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT THEY PLACE UNLAWFUL LIMITATIONS UPON THE CONSIDERATION OF MITIGATING CIRCUMSTANCES IN THE ABSENCE OF WHICH THE DEATH PENALTY MUST BE IMPOSED.

In Gregg vs. Georgia, 428 U.S.153, 49 L. Ed. 2d 859 (1976), it was held that use of the death penalty as punishment for murder does not, *per se*, constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. In that case the Court was satisfied that the constitutional requirement announced in Furman vs. Georgia, 408 U.S. 238 (1972), that the death penalty not be imposed arbitrarily or capriciously, was satisfied by the Georgia statute in issue which required the sentencing authority to focus its attention on the defendant and the circumstances of the crime.

49 L. Ed. 2d 913 (1976), this Court upheld a Florida statute which made use of the death penalty where the trial judge made the final determination of sentence and in doing so considered statutory aggravating and mitigating factors.

It is contended that Ohio's statutory scheme places unconstitutional and unlawful limitations upon what items may be considered as mitigating circumstances. Section 2929.04 (B) of the Ohio Revised Code lists the mitigating circumstances that may be considered in determining whether the defendant receives a life sentence or the death penalty. This list concerns itself with only the establishment of duress, coercion, provocation and mental deficiency, all of which point to the condition of the defendant at the time of the offense. Items such as the defendant's age, character, educational level and background are not considered. Yet these matters should be significant in determining whether a defendant lives or dies. These matters play a role in the sentencing process for crimes other than capital ones. How, when determining the ultimate sentence in a capital case, can they be constitutionally omitted? It is submitted to that factors such as those listed above become even more important when the death penalty is a possibility.

In Woodson vs. North Carolina, 428 US 280 96 S.Ct. 2978, 2992, it was stated that "...the penalty of death is qualitatively different from a sentence of imprisonment, however long... there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

Defendant submits that Ohio's law leans more toward the laws which were invalidated in Woodson vs. North Carolina, supra, Roberts vs. Louisiana, 428 US 325 96 S. Ct. 3001 (1976) (Roberts I), and Roberts vs. Louisiana, 431 US 633, 97 S. Ct. (1977) (Roberts II), than those that were upheld in Gregg vs. Georgia, 428 US 153, 49 L.Ed.2d 859 (1976), and Proffitt vs. Florida, 428 US 242 49 L. Ed. 2d 913 (1976). In Proffitt vs. Florida, supra, this Court noted that the Florida Supreme Court had set aside the death sentence in eight of the twenty-one cases reviewed. In none of the cases had the Supreme Court had considered a mitigating factor.

effective January 1, 1974, has the death penalty been overturned because the statutory mitigating circumstances have been established. The Ohio Supreme Court has considered approximately thirty cases under this law.

3. SECTION 2929.04 (B) OF THE OHIO REVISED CODE, WHICH REQUIRES A DEFENDANT CONVICTED OF AGGRAVATED MURDER TO BEAR THE RISK OF NON-PERSUASION CONCERNING CERTAIN MITIGATING CIRCUMSTANCES NEEDED TO BE SENTENCED TO LIFE IMPRISONMENT RATHER THAN DEATH, VIOLATES THE DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION. THE PROSECUTION MUST PROVE BEYOND A REASONABLE DOUBT THE ABSENCE OF MITIGATING CIRCUMSTANCES.

This portion of the argument deals with the sentencing stage under the Ohio death penalty statutes. Under Section 2929.03 (E) of the Ohio Revised Code, the trial court must impose a sentence of death if it finds that none of the mitigating circumstances listed in Section 2929.04 (B), Ohio Revised Code, is established by a preponderance of the evidence. Otherwise, it must impose a sentence of life imprisonment.

In State vs. Downs, 51 Ohio St. 2d 47 (1977), the court held that under the provisions of 2929.03(D) and (E) and 2929.04 (B) of the Ohio Revised Code, neither the defendant nor the prosecution is required by statute to offer testimony or other evidence of mitigating circumstances. The defendant, however, still bears the risk of non-persuasion. Therefore, these provisions violate due process of law as set forth above. Due process requires the State to prove beyond a reasonable doubt the absence of any of the mitigating circumstances listed in Section 2929.04 (B) of the Ohio Revised Code. See In re Winship, 397 U.S. 358 (1970), where this Court held that a New York procedure which placed on the prosecution the burden of proving delinquency by a preponderance of the evidence in juvenile delinquency cases violated due process. The proper standard, this Court held, was proof beyond a reasonable doubt.

See Mullaney vs. Wilbur, 421 U.S. 684 (1975), where the Court struck down a Maine procedure which required a defendant to prove by a preponderance of the evidence the existence of provocation to reduce murder to voluntary manslaughter.

When the issue during the sentencing stage is life or death, the concern during that portion of the proceedings is at least as crucial as it is when the defendant's guilt or innocence is at stake. The same standard should apply during all phases of the proceedings. It is submitted that the sentencing scheme in the Ohio death penalty provisions is unconstitutional and the defendant cannot be lawfully sentenced to die.

#### CONCLUSION

For the reasons stated, the questions presented above are substantial and are of great public importance. Petitioner respectfully urges this Court to require the State of Ohio to comply with the high standards of reliability and procedural regularity as befits a statutory scheme consistent with the mandates of the United States Constitution.

RESPECTFULLY SUBMITTED,

*James R. Cooper*  
James R. Cooper  
MORROW, GORDON & BYRD  
33 West Main Street  
P. O. Box 816  
Newark, Ohio 43055  
614/345-9764  
ATTORNEY FOR PETITIONER

PROOF OF SERVICE

A copy of the foregoing petition was served on David  
E. Lighttiser, Prosecuting Attorney for Licking County, Ohio,  
Attorney for Respondent, this 3rd day of July,  
1978.

  
\_\_\_\_\_  
James R. Cooper  
ATTORNEY FOR PETITIONER

A P P E N D I X A

The Opinion of the Court in State v. Nabozny, 54 Ohio St. 2d 195  
has not been reproduced.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, }  
City of Columbus. }

1978 TERM  
To wit: May 10, 1978

State of Ohio,  
Appellee,

vs.  
William V. Nabozny,  
Appellant.

No. 77-821

APPEAL FROM THE COURT OF  
APPEALS

FOR YOUR  
INFORMATION  
ONLY  
NOT FOR FILING

for..... LICKING..... County

LICKING

This cause, here on appeal from the Court of Appeals for.....  
County, was heard in the manner prescribed by law. On consideration thereof, the

judgment of the Court of Appeals is affirmed for the reasons set forth in the  
opinion rendered herein and it appearing to the Court that the date heretofore  
fixed for the execution of the judgment and sentence of the Court of Common Pleas  
is now past, this Court proceeding as required by law does hereby fix the 10th day  
of July, 1978, as the date for carrying said sentence into execution by the  
Superintendent of the Southern Ohio Correctional Facility, or in his absence by  
the Assistant Superintendent, in accordance with the statutes in such case made  
and provided.

It is further ordered that a certified copy of this entry and a warrant  
under the seal of this Court be duly certified to the Superintendent of the Southern  
Ohio Correctional Facility and the Superintendent make due return thereof to the  
Clerk of the Court of Common Pleas of Licking County,

and it appearing that there were reasonable grounds for this appeal, it is ordered  
that no penalty be assessed herein.

It is further ordered that the..... appellee..... recover  
from the..... appellant..... its..... costs herein ex-  
pended; that a mandate be sent to the..... COMMON PLEAS COURT.....  
to carry this judgment into execution; and that a copy of this entry be certified to  
the Clerk of the Court of Appeals for..... LICKING..... County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the  
foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court  
this..... day of..... 19.....

Clerk

Deputy

FOR YOUR  
INFORMATION  
ONLY  
NOT FOR FILING

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, }  
City of Columbus. }

1978 TERM

To wit: May 10, 1978

State of Ohio,

Appellee,

vs.

William V. Nabozny,

Appellant.

To the Honorable.....

COMMON PLEAS COURT

Within and for the County of....., LICKING, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

It is further ordered by the court that execution date be set for Monday,

June 10, 1978.

THOMAS STARTZMAN,  
Clerk

19.....

Deputy

RECORD OF COSTS

Docket Fee . . . . .	\$ . . . . .	Paid by . . . . .	Affidavit of Poverty . . . . .
Docket Fee . . . . .	\$ . . . . .	Paid by . . . . .	
Docket Fee . . . . .	\$ . . . . .	Paid by . . . . .	
Printing Record . . . . .	\$ . . . . .	Paid by . . . . .	
Supplemental Record . . . . .	\$ . . . . .	Paid by . . . . .	
Sheriff's Costs . . . . .	\$ . . . . .	Paid by . . . . .	
Sheriff's Costs . . . . .	\$ . . . . .	Paid by . . . . .	

5

THE STATE OF OHIO, }  
City of Columbus. }

1978 TERM

The State of Ohio,  
Appellee,

To wit: May 18, 1978

vs.

William V. Nabozny,  
Appellant.

No. 77-821

ENTRY

( LICKING COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of a notice of appeal or a petition for a writ of certiorari to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed pending the timely filing of a notice of appeal or a petition for a writ of certiorari to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal or a petition for a writ of certiorari is filed to the Supreme Court of the United States, this stay will automatically continue pending final determination of the case by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

C. William Dierel  
CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of

said Court, to wit, from Journal No. .... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 18th day of May 1978.

THOMAS L. STARTZMAN Clerk

By Law 2. Gossman Deputy.

## CHAPTER 2903: HOMICIDE AND ASSAULT

Section	HOMICIDE
2903.01	Aggravated murder.
2903.02	Murder.
2903.03	Voluntary manslaughter.
2903.04	Involuntary manslaughter.
2903.05	Negligent homicide.
2903.06	Aggravated vehicular homicide.
2903.07	Vehicular homicide.
2903.08 to 2903.10 [Repealed.]	

ASSAULT	
2903.11	Felonious assault.
2903.12	Aggravated assault.
2903.13	Assault.
2903.14	Negligent assault.
2903.15, 2903.16 [Repealed.]	

MENACING	
2903.21	Aggravated menacing.
2903.22	Menacing.

### Committee Comment

Chapter 2903. defines those offenses, other than assaultive sex offenses, of which the primary thrust is actual or potential harm to persons.

The chapter contains the single capital offense defined in the code, aggravated murder, which includes the planned killing in cold blood, and the purposeful killing committed during kidnapping, rape, arson, robbery, burglary, or escape. The lesser offense of murder is defined simply as the purposeful killing of another.

Elements of the former offense of first degree manslaughter are divided between two sections: voluntary manslaughter, which is knowingly killing another while under extreme emotional stress brought on by serious provocation; and involuntary manslaughter, which is killing another as a proximate result of the commission of a felony. Involuntary manslaughter carries a more severe penalty if the death was caused through commission of a felony than if it resulted from commission of a misdemeanor. Under former law the penalty for manslaughter was the same regardless of whether the offense was voluntary or involuntary, and regardless of the cause of death. Negligent homicide, a new offense, is defined as negligently killing another by means of a deadly weapon or dangerous ordnance.

Two vehicular homicide offenses are included in the chapter, both dealing with killing another while operating a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft. The difference between the two is that the aggravated offense is committed recklessly, while the less serious offense is committed negligently. Former law connected these offenses to the violation of various traffic laws, rather than to the recklessness or negligence of the offender. Also, former law did not provide a homicide offense involving snowmobiles or aircraft, and the offense involving locomotives was obsolete and unenforceable.

Four assault and two menacing offenses are defined

in the chapter. Felonious assault is knowingly causing serious physical harm to another by any means, or knowingly causing or attempting to cause physical harm to another by means of a deadly weapon or dangerous ordnance. Aggravated assault is the same, except that it is committed while the offender is under extreme emotional stress induced by serious provocation. Thus, felonious assault and aggravated assault complement murder and voluntary manslaughter, respectively. Simple assault and negligent assault offenses are also defined, complementing involuntary manslaughter and negligent homicide, respectively. The two menacing offenses are defined as causing another to believe the offender will harm him or his family or his property, and the distinction between the two is based on the degree of threatened harm.

### HOMICIDE

#### § 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

HISTORY: 134 v H 511, ER 1-1-74.

Not analogous to former RC § 2903.01 (126 v 114), repealed 134 v H 511, § 2, ER 1-1-74.

The effective date of H 511 is set by section 4 of the act.

### Committee Comment

The first part of this section restates the former crime of premeditated murder so as to embody the classic concept of the planned, cold-blooded killing while discarding the notion that only an instant's prior deliberation is necessary. By judicial interpretation of the former Ohio law, murder could be premeditated even though the fatal plan was conceived and executed on the spur of the moment. See, *State v. Schaffer*, 133 Ohio App. 125, 17 O.O. 2d 114, 177 N.E. 2d 534 (Lawrence Co. App., 1960). The section employs the phrase, "prior calculation and design," to indicate studied care in planning or analyzing the means of the crime, as well as a scheme compassing the death of the victim. Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves, but they must amount to more than momentary deliberation.

The second part of the section defines the offense

## APPENDIX B

"dangerous offender," used in connection with determining sentences, eligibility for probation, and eligibility for early release on parole.

In general, repeat offenders are those with a history of persistent criminal activity and who appear to be bad risks for the future. A person is *prima facie* a repeat offender if he has served time on a prior conviction and is convicted of a second offense of violence, second sex offense, or second theft offense, or is convicted of a third felony, or of a fourth offense of any kind or degree (other than a minor misdemeanor, intoxication offense, or traffic offense).

"Dangerous offenders" are those who have committed an offense, whose history, character and condition reveal them as dangerous, and whose conduct shows a pattern of repetitive, compulsive, or aggressive behavior without thought for the consequences. The term "dangerous offender" equates with "psychopathic offender."

#### Transition — capital offenses.

Persons charged with a capital offense committed prior to January 1, 1974, must be tried under the law as it existed at the time of the offense and, if convicted, sentenced to life imprisonment. If the section defining the offense provides for a lesser penalty under the circumstances of a particular case, then the lesser penalty must be imposed in that case.

Persons committing aggravated murder (the only capital offense in the new code) on and after January 1, 1974, must be charged and tried under the new law and, if convicted, may be subject to the death penalty. See, sections 2903.01, 2929.02 to 2929.04, and 2941.14.

#### Research Aids

21 AmJur2d: Criminal Law §§ 525 to 615

#### ALR

Effect of delay in taking defendant into custody after conviction and sentence. 98 ALR2d 687.

Length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment. 33 ALR3d 335.

Necessity and sufficiency of question to defendant as to whether he has anything to say why sentence should not be pronounced against him. 98 ALR2d 1292.

Notice of application or intention to correct error in judgment entry in criminal cases. 14 ALR2d 224.

Racial discrimination in punishment for crime. 40 ALR3d 227.

Voluntary absence of accused when sentence is pronounced. 6 ALR2d 997.

When criminal case becomes moot so as to preclude review of or attack on conviction or sentence. 9 ALR3d 482.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 ALR3d 18.

#### PENALTIES FOR MURDER

#### § 2929.02 Penalties for murder.

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised

Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

HISTORY: 134 v H 511. EM 1-1-74.

#### Committee Comment

This section establishes the penalty for aggravated murder as life imprisonment or death, plus an optional fine of up to \$25,000. The penalty to be imposed in a given case of aggravated murder is determined by the procedure given in sections 2929.03 and 2929.04. The penalty for murder is given as imprisonment for 15 years to life, plus an optional fine of \$15,000. A fine for aggravated murder or murder may not be imposed unless the crime was committed for hire or profit, or in support of organized crime. Also, a fine or fines may not be imposed, which to the extent not suspended exceeds the amount the offender can pay without undue hardship to himself or his dependents, or which will prevent him from making reparation for the victim's death.

#### Research Aids

27 OJur2d: Homicide §§ 202.1, 202.2  
40 AmJur2d: Homicide §§ 552-557

#### ALR

Indigency of offender as affecting validity of imprisonment as alternative to payment of fine. 31 ALR3d 926.

Propriety of general sentence covering several counts in information or indictment not exceeding in aggregate the sentences which might have been imposed cumulatively under the several counts. 91 ALR2d 511.

#### CASE NOTES AND OAG

1. The decision of the U. S. Supreme Court in *Furman v. Georgia* compels the Ohio supreme court to modify death sentences imposed under [former] RC § 2901.01, reducing them to life imprisonment, but not to set aside first degree murder convictions, or to

invalidate the indictment: *Vargas v. Metzger*, 35 OS (2d) 118, 64 OÖ(2d) 70, 298 NE(2d) 600 (1973).

2. The infliction of any death penalty under the existing law of Ohio is now unconstitutional: *State v. Leigh*, 31 OS(2d) 97, 60 OÖ(2d) 80, 285 NE(2d) 333 (1972).

#### § 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-

examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

HISTORY: 134 v H 511. EM 1-1-74.

#### Committee Comment

This section specifies the procedure to be followed in determining whether the sentence for aggravated murder is to be life imprisonment or death.

The death penalty is precluded unless the indictment contains a specification of one or more of the aggravating circumstances listed in section 2929.04. In the absence of such specifications, life imprisonment must be imposed. If the indictment specifies an aggravating circumstance, it must be proved beyond a reasonable doubt, and the jury must return separate verdicts on the charge and specification. If the verdict is guilty of the charge but not guilty of the specification, the penalty is life imprisonment.

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is established by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a reasonable doubt, and the panel's verdict must be unanimous.

With respect to the mitigation phase of the trial, the procedure is somewhat different depending on whether the case is tried by a jury or a three-judge panel. A jury tries only the charge and specification, and the judge in a jury trial determines mitigation. If a jury is waived, the same three-judge panel tries not only the charge and specification, but also determines the presence or absence of mitigation. Also, the statute expressly provides that the panel's finding that no mitigating circumstance is established must be unanimous, or the death penalty is precluded. In other respects, the procedure for determining mitigation is similar whether the trial judge or a three-judge panel tries the issue. Mitigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this phase of the trial (the requirement for a pre-sentence investigation and report, the requirement for a psychiatric examination and report, and the provision for an unsworn statement by

the defendant, represent partial exceptions to the rules of evidence).

See Committee Notes re "Transition" following RC § 2929.04.

#### Research Aids

40 AmJur2d: Homicide §§ 552-557

#### ALR

Beliefs regarding capital punishment as disqualifying juror in capital case—Post Witherspoon Cases. 39 ALR3d 550.

#### Law Review

Confessions of guilt; necessity of additional evidence. (Case note.) 7 OSLJ 440.

#### CASE NOTES AND OAG

See case notes under RC § 2929.02.

1. The state must prove the material elements of the crime of murder in the first degree, including premeditation and deliberation, beyond a reasonable doubt, in order to resolve the degree issue in the hearing under [former] RC § 2945.06: State v. Taylor, 50 OApp2d 252, 59 OO(2d) 398, 285 NE(2d) 89.

2. Where a person charged with an offense punishable by death under CC § 12400 (RC § 2901.01) elects to be tried by a three-judge court under this section, the rule in respect to granting or withholding mercy is the same as that in effect when trial by jury is had, since the judges under this section "have power to decide all questions of fact and law" and may "extend mercy and reduce the punishment . . . in like manner as upon recommendation of mercy by a jury." In such cases the exercise of power of the judges to grant or withhold mercy given by this section and CC § 12400 (former RC § 2901.01) rests solely within their sound discretion in the light of the facts and circumstances disclosed by the evidence: State v. Lucent, 83 App 281, 51 OO 39, 109 NE(2d) 39.

3. Under this section a three-judge court has the jurisdiction, under a plea of guilty to a charge of murder while attempting to perpetrate a robbery, to decide the case and sentence the defendant without a waiver in writing as contemplated by CC § 13442-4 (former RC § 2945.05): State ex rel Scott v. Alvis, 62 OLA 241, 107 NE(2d) 211 (App).

#### § 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his

name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

HISTORY: 134 v H511. ER 1-1-74.

#### Committee Comment

This section provides that the death penalty for aggravated murder is precluded unless one of seven listed aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The seven aggravating circumstances deal with: (1) assassination of the President, Vice President, Governor, Lieutenant Governor, or a person who has been elected to or is a candidate for any such office; (2) murder for hire; (3) murder to escape accountability for another crime; (4) murder by a prisoner; (5) repeat murder or mass murder; (6) killing a law enforcement officer; and (7) felony murder.

THE STATE OF OHIO,  
City of Columbus. }

1978 TERM

The State of Ohio,  
Appellee,

To wit:..... May 18, 1978.....

vs.

William V. Nabozny,  
Appellant.

No. 77-821

ENTRY

( LICKING COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of a notice of appeal or a petition for a writ of certiorari to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed pending the timely filing of a notice of appeal or a petition for a writ of certiorari to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal or a petition for a writ of certiorari is filed to the Supreme Court of the United States, this stay will automatically continue pending final determination of the case by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

C. William Dineen  
CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of

said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 18th day of May 1978.

THOMAS L. STARTZMAN..... Clerk.

By..... Law & General..... Deputy.